Office-Supreme Court,
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SEP 8 1961
JAMES R. BROWNING.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 395

LEVI S. McDONALD, *Petitioner*,

v.

STATE OF OREGON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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LEVI S. MCDONALD, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on May 10, 1961.

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (Appendix A, *infra*, pp. A1-A21) is reported at 72 Oregon Advance Sheets 975 and at 361 P. 2d 1001. The opinion of the United States District Court for the District of Oregon denying petitioner's motion for removal is reported at 180 F. Supp. 861.

JURISDICTION

1. The judgment of the Supreme Court of Oregon (Appendix B, *infra*, page A22) was entered on May 10, 1961. A timely petition for rehearing was denied on June 13, 1961 (Appendix B, *infra*, page A23).

2. The Federal question was raised as indicated at pp. 15-16, *infra*.

3. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, where the accusation is by indictment, the repeated publication in newspapers and in broadcasts on television of generalized statements of petitioner's guilt, as well as similar publication of statements of witnesses who implicated petitioner, which statements had been supplied by State officers, so far prevented the grand jury from acting as a fair and impartial body, when finding the indictment against petitioner, as to have denied him equal protection and due process of law.

2. Whether the denial of petitioner's timely motion for a postponement of a trial because of widespread community prejudice against him, created by adverse newspaper and television publicity that had been intensively disseminated throughout the State, commencing prior to his indictment and continuing for nearly two months thereafter, so far deprived him of a fair trial as to have denied him due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitutional provisions basically involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment; these are sufficiently familiar to the Court as not to require quotation.

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2. Certain Oregon statutes are referred to in the course of the petition, but the case does not turn on their terms.

STATEMENT

Petitioner has been sentenced to pay a fine of $500 and to serve an indeterminate sentence of not to exceed ten years (R. 139)[1] upon conviction by a jury of the crime of "Injury to Property by Explosives", in violation of O. R. S. 164.830.

In the present posture of the case, no question is raised concerning the sufficiency of the evidence nor concerning any issue other than the quantum and effect of the newspaper and television publicity adverse to petitioner on (a) his indictment by grand jury and on (b) his request to postpone his trial until the effects of such publicity had been dissipated. As will appear, his motion to quash the indictment on the grounds of prejudice and his motion to postpone the trial were severally denied. The facts pertinent to those issues may be summarized as follows:

A. Gravamen of the charge

It was alleged in the indictments (R. 7, 16)—omitting epithets—that on January 31, 1960, petitioner set off and exploded a quantity of dynamite with intent to injure four trucks, the property of The Hertz Corporation. These trucks were leased to and operated by the Oregonian-Oregon Journal, two newspapers at that time circulating together (Apr. Tr. 12). Petitioner was a stereotyper working for those papers, but on strike at the time; and there is no dispute that he was, at the time of the alleged offense, a

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[1] The record in this case is unprinted. "R." refers to the basic file of court papers. "Tl. Tr." refers to the four typewritten volumes of the Trial Transcript, which are paged consecutively. "Feb. Tr." refers to the typewritten transcript of the hearings in February 1960 on petitioner's motion to quash the indictment. "Apr. Tr." refers to the hearings on April 21, 1960, on petitioner's motion for postponement.

member of his union's negotiating committee. Considerable evidence was adduced at the trial to the effect that petitioner was interested in shortening the strike by stopping the newspapers' trucks.

There was also evidence at the trial that the three Snyder brothers—Edward, Charles, and William—participated in the bombings, both in Multnomah and Clackamas Counties, and that all three had been indicted by the same grand jury that indicted petitioner, and at the same time (Tl. Tr. 839). At petitioner's trial, the presiding judge ruled that the three Snyders, the wives of Edward and Charles, Caryl Forbish, Gerald Couzens, and O. L. Hull were accomplices, whose testimony required corroboration (Tl. Tr. 855). All of these testified against petitioner; the three Snyder boys were then in jail (Tl. Tr. 425, 513, 637), awaiting sentencing after pleas of guilty (R. 65).

B. The first publicity directed at petitioner

On Friday, February 12, 1960, the Oregonian-Oregon Journal's front page was topped by a banner headline reading "5 HELD IN NEWS BOMBING", followed by "Hireling Implicates Union Man." (Ex. 1, R. 45). On the same page was a picture of petitioner in custody, with the caption, "Eyes downcast, Levi McDonald (left) moves along courthouse corridor in custody of State Police Lt. Howard Benninghoff. McDonald, member of striking Stereotyper's Union negotiating committee, was named by other suspects as man who provided payoff money and took part in planning and setting off dynamite explosions."

The news story contained (continued as Ex. 1a, R. 46) a summary of admissions made public by Sheriff Lambert of Multnomah County, as well as a partial text of Gerald Couzens' statement. According to the newspaper account (Ex. 1, R. 45),

> "Couzens' story was told first to police, then recorded and then played for a room full of press, radio

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and television reporters while Couzens himself sat alongside the record and listened to his own story."

Another issue of the joint newspaper, dated February 12/13[2] (Ex. 6, R. 50), was headed "Suspect Confesses, Names Others"; it contained the full text of Couzens' statement. Following it appeared a story entitled "Sheriff, Men Kept In Rush", which contained the following:

"From the time the first suspect in the truck dynamiting case was brought in until the sheriff said, 'We've got it in a bucket now,' the place milled with lawmen, newsmen, cameramen, attorneys, members of the district attorney's staff, union members and stenographers.

"While the taped statement of Gerald Couzens was played in one room, county and city officers questioned the three Snyder brothers in other rooms. The wives of two of the Snyders were interrogated elsewhere in the building.

"A mountain of sandwiches, cake, potato chips and coffee rapidly melted in the sheriff's ante room. Telephones rang and typewriters clicked.

"In the sheriff's inner office, William Snyder sobbed into a folded handkerchief under the bright floodlights held by TV cameramen.

"Sheriff Lambert answered a telephone, talked briefly, and then announced that deputies were bringing in Levi McDonald. There was a surge to the SW 4th avenue door of the courthouse as photographers recorded McDonald's entrance."

The papers' issues for February 12/13 also contained the following items:

1. A story headed "Prisoner Says $100 Pay For Bombing Given to Him by Striking Stereotyper" (Ex. 5, R. 49).

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[2] "Oregon Journal, Friday, February 12: The Oregonian, Saturday, February 13."

This article summarized the statement implicating petitioner that was made by Charles Snyder.

2. A story headed "Bomb Plot Laid To Union Man In Alleged Hireling's Confession" (Ex. 8, R. 41). This article summarized the statement implicating petitioner made by Charles Snyder's twin brother (Tl. Tr. 426), Edward.

3. A story headed "Neighbor Says Unionist Tried to 'Enlist' Him" (Ex. 4, R. 39). This article summarized the statement implicating petitioner made by Caryl Forbish, who later withdrew from the plan.

On Saturday, February 13, the following items appeared in the press:

1. Another front page story (Ex. 2, R. 47), headed "Police Nab Eighth Man In Bombing". This account quoted Mr. Geurts, chief criminal deputy for the district attorney's office, as saying that the entire case would be presented to a grand jury on Saturday morning—the day of the paper's publication—and that the eighth man would appear as a witness. The story also set forth that petitioner was being held in a total of $90,000 bail.

2. A story headed "Unionist Silent About Bombings, But Hirelings Plenty To Say" (Ex. 3, R. 48).

3. An editorial by The Oregonian entitled "Big Break in Bombings, But More Answers Due" (Ex. 7, R. 40).

C. Petitioner's first indictment and its dismissal

On the same day, Saturday, February 13, petitioner was indicted for the first time (R. 7). That fact was proclaimed to the community the next day on the front page of the Sunday Oregonian-Sunday Journay under the heading "Jury Indicts Five As Van Bombers" (Ex. 9, R. 51). Immediately below the headline were five pictures, of petitioner, Couzens, and the three Snyder brothers.

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On inside pages appeared Edward Snyder's statement in its entirety under two full page banner headlines. One read "Edward Snyder Says Striking Stereotyper Directed Bombing" (Ex. 10, R. 52); the other, "Statement Tells Of Speedy Getaway From Dynamiting Scene" (Ex. 10a, R. 53).

Petitioner moved to quash the first indictment on numerous grounds (R. 9-13), one of which was (¶2, R. 9) that the grand jury received hearsay evidence, viz., that court reporters simply read from their notes the statements made by Couzens and the Snyders, and that the names of the latter—the real witnesses—were not indorsed on the indictment (¶1, R. 9). When a hearing established the truth of those challenges (Feb. Tr. 31-81; R. 54-56), the State on its own motion, proceeding *ex parte* (Feb. Tr. 82-84), procured an order dismissing the indictment (R. 15).

D. Petitioner's second indictment and second motion to quash

One of the grounds asserted in the original motion to quash was that the grand jury had been improperly influenced by the newspaper articles and television programs, and so did not act fairly and impartially (¶5, R. 10).

Accordingly, after the first indictment was dismissed at the instance of the State, the judge delivered the following charge to the same grand jury that had returned the original indictment (Feb. Tr. 83-84):

> "THE COURT: Ladies and gentlemen of the Grand Jury: Mr. Geurts, Chief Criminal Deputy District Attorney for this county, has advised the Court that his office desires to resubmit for your consideration criminal charges against Levi McDonald. Now, in any further consideration which you give to criminal charges against Levi McDonald, you are hereby directed and ordered to disregard any and all evidence heretofore presented pertaining either to Levi McDonald or to Edward Snyder or to Charles Snyder or to William Snyder and also as to Gerald Couzens.

You will likewise disregard any newspaper reports which have come to your attention involving Levi McDonald or the Snyders or Couzens. The same applies to television programs or radio programs. In other words, in any further consideration which you give to criminal charges against Levi McDonald, you will base your decision solely and exclusively upon such evidence as is hereafter submitted to you. In other words, anything which has gone before, whether it pertained to Levi McDonald or pertained to any one of the three Snyder brothers or to Couzens, is to be completely disregarded by you, and you are to base any decision which you might make with respect to this resubmission pertaining to Levi McDonald upon such evidence, if any, as might hereafter be submitted to you, disregarding, of course, as I have already instructed you, newspaper stories, television programs, radio programs, or any information which might have come to your attention through any medium or source.

"In other words, in resubmitting this matter to you for your consideration, your action, your decision is to be based solely and exclusively upon such competent evidence as is hereafter submitted to you for your consideration."

The same day, the same grand jury returned a second indictment (R. 16), the language of which was identical, word for word, with that of the first indictment (R. 7).

Petitioner then moved to quash and set aside the indictment (R. 17-53), on the ground *inter alia* (¶3, R. 18)—

"That said indictment was not found nor investigated by the Grand Jury free of passion or prejudice and without influence in that the Grand Jurors had read newspaper articles and heard and viewed television and radio broadcasts concerning purported facts and the charge under investigation and were so influenced thereby that they could not and did not act as a fair and impartial jury in determining the findings of the indictment against the defendant and thereby deprived the defendant of due process of law and of equal

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protection of the law under the laws of Oregon and the Fourteenth Amendment to the Constitution of the United States."

An affidavit in support of this motion (R. 29-38) attached ten newspaper articles (Ex. 1-10a, R. 39-41, 45-53); these have already been described above, pp. 4-7.

The motion to quash was denied by Judge Denecke on March 7, 1960 (R. 58). Prior to the time when the motion was filed, on February 25, Judge Redding had said (Feb. Tr. 98-99):

> "I am not unaware that the contention is frequently made that the outcome of trials is influenced by publicity. However, I think we must recognize that crimes of the nature we are here dealing with will inevitably result in publicity and publicity concerning anyone who is charged with the commission of such a crime. On the other hand, I have an abiding confidence in American juries, both grand and petit, and I have an abiding conviction that the seven members of this Grand Jury followed the Court's instructions when the Court instructed them to disregard these matters. • • • And I had the feeling that if waiting seven days until we got the Grand Jury a week from Monday would have given us people who hadn't read the newspapers or hadn't heard radio or television programs, why there might have been merit in what you have to say; but I think that a week would not have solved the problem, or a month. • • • "

E. Petitioner's motion for a postponement

On April 19, 1960, petitioner moved (R. 61)

> " • • • for a Change of Venue or a Postponement of Trial on the ground and for the reason that the defendant cannot have a fair and impartial trial in Multnomah County, Oregon, or in any other county of the State of Oregon at this time, or until the hostile publicity and public opinion against the defendant has subsided, and for the reason that the recent hostile

publicity against the defendant was created by the action of the District Attorney in causing the defendant to be indicted on another bombing charge approximately two weeks prior to the date set for the trial herein when the District Attorney knew that widespread publicity would follow such indictment, and that when taken in connection with the previous hostile publicity against the defendant, would prevent the defendant from having a fair and impartial trial on the day set therefor, or for a long time thereafter."

The motion was phrased in the alternative under the terms of the State statute (Apr. Tr. 4), but petitioner's counsel at two hearings (Apr. Tr. 4-6) made it clear that he was asking only for a postponement, "so that the effect on the public opinion would have subsided" (Apr. Tr. 6).

The following evidence was presented in support of the motion:

1. Petitioner's affidavit (R. 62-66), (a) summarizing 11 newspaper articles published shortly after his arrest on February 11, 1960, from February 12 to 19 (R. 62-63); (b) summarizing 10 additional newspaper articles from February 22 to April 4 concerning his court appearances (R. 63-64); (c) summarizing 5 additional newspaper articles from March 28 to 30 linking petitioner with certain bombings in Oklahoma (R. 64-65); (d) summarizing 4 more articles on April 6 and 7 that set forth the pleas of guilty entered by Couzens and the three Snyders and reprinted or summarized the statements implicating petitioner that they had made in February (R. 65); (e) summarizing an article dated April 9 concerning petitioner's indictment for setting off a stink bomb (R. 65); and (f) summarizing a six page paper entitled "Strike Facts" circulated by the Oregonian and Oregon Journal that contained pictures of the damaged trucks, of Charles Snyder carrying dynamite, and of petitioner, the latter labeled "Plotter and Pay-Off Man" (R. 65-66).

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2. Twenty-three affidavits signed by some 472 individuals expressing the opinion, in varying forms of language, that it would be impossible for petitioner to have a fair trial anywhere in Oregon then or for a long time to come (R. 67-112).

In opposition, the prosecution asserted that "almost all of these names" were either those of striking employees of the Journal-Oregonian or "obviously the wives of the striking employees" (R. 114-115), based on police affidavits to that effect (R. 122-129); submitted six affidavits notarized by Oscar D. Howlett, the Deputy District Attorney who later tried the case and argued the appeal, signed by six citizens who expressed the opinion that an unprejudiced jury of 12 jurors could be impaneled in Multnomah County (R. 116-121); and also submitted Mr. Howlett's own affidavit to the effect that, in his opinion, petitioner could receive a fair trial (R. 130-131).

The matter was further developed at a hearing on April 21, at which time the several newspapers mentioned in petitioner's affidavit were presented (Apr. Tr. 10), and a group of scripts and television films shown over three Portland television stations were likewise produced (Apr. Tr. 25, 31, 39, 43-45).

The evidence showed that the three television stations covered most of the State of Oregon, in a listening area that had some 441,000 television receivers (Apr. Tr. 19, 37, 45), and that all three had covered extensively every aspect of petitioner's case, both by commentary and on film, over a long period.[3]

All three television stations were on the air on February 11 and 12, the two days just before petitioner was first

[3] The summary that follows is drawn from the actual texts of the several scripts, Def. Ex. 33, 37, 43, and 45, unprinted, which have been duly transmitted as a part of the record herein. The listings of Foster's evening KOIN broadcasts, Def. Ex. 34 and 35, diverge in some respects from his actual KOIN scripts, Def. Ex. 33.

indicted, to broadcast the details of the witnesses' statements, and all showed pictures except only KGW on the 12th. Between then and petitioner's second indictment, on February 24, one or more television stations broadcast matters relating to petitioner's case, with pictures more often than not, except only on Sunday, February 21.

An item relating to the alleged connection between the Portland-Oregon City bombings and some in Oklahoma City appeared on Foster's KOIN broadcast on March 31.

Items reporting petitioner's indictment on charges of throwing a stink-bomb appeared on KGW and on KOIN's noon and evening broadcasts on April 8.

Petitioner's news conference on February 22, which was relied on by the prosecution as a reason militating against the requested continuance (R. 130), was duly covered by all three television stations, but was followed by denigrating comments. KOIN's evening broadcast (Def. Ex. 33) contained a statement by the publisher of the Oregonian characterizing petitioner's statements and conference as "transparent frauds". Another KOIN broadcast (Def. Ex. 37) emphasized that "McDonald had paid the public relations firm a retainer fee". KPTV (Def. Ex. 45) commented that "the whole thing took place in the offices of a public relations agency hired by McDonald to represent him." KGW (Def. Ex. 43) criticized petitioner, saying he was himself trying his case in advance: "a public relations firm's sole purpose in existing is to influence public opinion • • • it will be a sad day for American justice when any case is pre-tried from the headquarters of a public relations agency."

Many of the television scripts consistently and regularly linked petitioner's name with the accusation on which he had not yet been tried: "accused of being behind the bombing of 10 newspaper trucks", "accused of plotting the bombing of 10 newspaper trucks", "accused of plotting

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the bombing of 10 trucks",—or, more simply—"accused newspaper truck bomber".

And on April 5 and 6, KOIN in several broadcasts reported pleas of guilty by Couzens and the three Snyder brothers, reporting (Def. Ex. 37, Apr. 6, p. 2), "Police say the 4 have signed statements which say Levi McDonald, a Portland stereotyper, masterminded the bomb plot."

Still photographs used on the television broadcasts, some of which (Def. Ex. 38, 40, 41; Apr. Tr. 32) had been taken in courtrooms prior to court sessions, were introduced in evidence (see also Def. Ex. 39, 41, 42), and the actual television films (Def. Ex. 36, 44, and 46) were exhibited to the court (Apr. Tr. 47).

Among the newspapers introduced as exhibits was an undated joint Oregon Journal-Oregonian six page paper entitled "Strike Facts" (Def. Ex. 29), which had been circulated by mail and otherwise throughout the State of Oregon (R. 65). Page 1 was topped by a banner headline, "PAPERS WILL NOT YIELD TO VIOLENCE." On page 2 appeared a picture of a damaged truck, beneath which was the caption "BLAST rocked northwest Portland and Oregon City in the night on Jan. 31 as ten trucks operated by contract carriers hauling newsprint and newspapers were dynamited. Explosions were another in series of 'Goon tactics.'" Immediately below this were two other pictures, described as follows: "DYNAMITE suspect Charles Snyder totes case of explosives. Snyder and three other men, accused of bombing 10 newspaper trucks, named Stereotyper Union Negotiator Levi McDonald (inset) as plotter and payoff man."

Petitioner's motion for postponement was denied (R. 132).

F. Petitioner's trial and appeal

Petitioner's trial lasted from May 3 to May 10 (R. 138). Parts of three days were taken up with the selection of a jury and two alternate jurors (Tl. Tr. 14-281). At the conclusion of the trial, petitioner was found guilty (R. 133, 138), whereupon he was sentenced to pay a fine of $500 and to be imprisoned in the penitentiary for an indeterminate period not to exceed ten years (R. 139); he duly appealed (R. 140).

On appeal, the judgment was affirmed (R. 143).

With respect to the grand jury point, the Supreme Court of Oregon said (Appendix, *infra*, p. A11) that "the fact a grand jury may have been prejudiced by hearsay evidence or prejudicial publicity which it ought not to consider is not grounds for dismissing or quashing an indictment, for the trial court would then be required to inquire into and determine in advance of each trial the sufficiency of all the evidence to sustain or reject an indictment, which it may not do."

With respect to the effect of the publicity, the Supreme Court of Oregon held (Appendix, *infra*, page A13) that the record did not show that the hostile atmosphere carried over into the trial, particularly in view of the extensive questioning on *voir dire*. "Therefore, while pretrial publicity prevents an idealistic approach to the trial of a person accused of a crime and is to be deplored, it cannot be said in this case that the publicity was so inflammatory or so slanted that an honest and impartial jury could not be selected whereby the defendant could receive a fair and impartial trial at the time he was tried, or that the trial was not conducted in 'an atmosphere of judicial calm'."

A timely petition for rehearing was denied (R. 144).

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HOW THE FEDERAL QUESTION WAS RAISED

1. *Grand Jury point.* (a) Par. 3 of petitioner's motion to quash the indictment (R. 18), quoted at pp. 8-9, *supra*, invoked the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This motion was denied (R. 58).

(b) Petitioner's Eighth Assignment of Error, as set forth at pp. 149-150 of "Appellant's Abstract of Record and Brief" in the Supreme Court of Oregon (item 31 in petitioner's amended praecipe and duly transmitted by the Clerk of that Court, see R. 149), was as follows:

> "The Court erred in denying Defendant's Motion to Quash or Set Aside the Indictment of February 24, 1960, made before plea, because of the obstructions to justice occasioned by officers of the court who participated in creating widespread and lasting prejudice against the defendant, which prevented the Grand Jury from acting as a fair and impartial body when finding the indictment against him and resulted in a denial of due process and equal protection of the law under the Oregon Constitution and the Fourteenth Amendment to the Constitution of the United States."

(c) The opinion of the Supreme Court of Oregon (Appendix A, *infra*, at pp. A9-A11) considered, discussed, and denied the foregoing Federal claim put forward by the petitioner.

(d) In points XVI and XVII of his petition for rehearing (item 37 in petitioner's amended praecipe and duly transmitted by the Clerk of that Court, see R. 149), petitioner renewed his grand jury contentions.

(e) Petitioner's petition for rehearing was denied (R. 144), so that the judgment affirming his conviction has become final.

2. *Failure to grant continuance.* (a) The substance of petitioner's motion for change of venue or postponement of trial (R. 61) has already been set forth at pp. 9-10, *supra.*

This motion was rested only on the laws and Constitution of the State of Oregon (R. 61), and, after a hearing (Apr. Tr. *passim*), was denied (R. 132).

(b) Petitioner's Ninth Assignment of Error, as set forth at p. 171 of "Appellant's Abstract of Record and Brief" in the Supreme Court of Oregon (item 31 in petitioner's amended praecipe and duly transmitted by the Clerk of that Court, see R. 149), included a claim of Federal right, as follows:

> "The Court erred in denying defendant's Motion for Change of Venue or Postponement of Trial because of official misconduct in creating widespread and lasting prejudice against the defendant, which so obstructed justice that the defendant was denied the fair trial by an impartial jury guaranteed him under the Constitution of Oregon and the Fourteenth Amendment to the Constitution of the United States."

(c) The Supreme Court of Oregon said (Appendix A, *infra*, at p. A12), "The question of the effect of publicity upon the trial of an accused and how best to protect him from the prejudicial effects thereof has given the courts of this country much concern. See Controlling Press and Radio Influence on Trials, 63 Harvard Law Rev. 840 (1950)." Since "courts of this country" plainly includes Federal courts, and since the Note that was cited referred to and discussed Federal as well as State precedents, the Supreme Court of Oregon necessarily considered, discussed, and denied the Federal claim put forward by the petitioner as well as his State claim.

(d) In points XVIII and XIX of his petition for rehearing (item 37 in petitioner's amended praecipe and duly transmitted by the Clerk of the Court, see R. 149), petitioner renewed his contention that the denial of his motion for a continuance rendered a fair trial impossible and hence amounted to a denial of due process of law.

(e) The petition for rehearing was denied (R. 144), rendering final the judgment of affirmance.

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REASONS FOR GRANTING THE WRIT

As did a number of recent cases in this Court (*Irvin* v. *Dowd*, 366 U. S. 717; *Janko* v. *United States*, 366 U. S. 716; *Marshall* v. *United States*, 360 U. S. 310), and as does one now awaiting argument (*Beck* v. *Washington*, No. 40, this Term), this case involves the effect of adverse newspaper and television publicity on an accused's chances for a fair trial. Compare *Shepherd* v. *Florida*, 341 U. S. 50; *Stroble* v. *California*, 343 U. S. 181. In the present instance, however, the situation is aggravated by the circumstance that the offending newspapers were not simply seeking to enhance their circulation or to pander to community prejudice, they were actually the injured parties, who had used in their own business the trucks that petitioner was charged with causing to be dynamited.

The basic issue is raised here in two aspects: First, the indictment found by a grand jury that had been subjected to the adverse publicity. Second, the propriety of the State courts' refusal to grant petitioner a continuance of his trial until the effect of that publicity would have been dissipated.

First. It has long been settled that, even though a State may substitute information for indictment (*Hurtado* v. *California*, 110 U. S. 516) or replace the traditional grand jury of 12 to 23 persons by one composed of a single individual (cf. *In re Oliver*, 333 U. S. 257), a defendant is still entitled, where a State continues to employ the common law grand jury, to have the case against him presented to an accusatory body composed of fair and impartial grand jurors. This is because "the most valuable function of the grand jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused." *Hoffman* v. *United States*, 341 U. S. 479, 485, quoting with approval from *Hale* v. *Henkel*, 201 U. S. 43, 59.

It has therefore long been settled that, regardless of the quality of the actual trial, the conviction of a Negro cannot stand if he was indicted by a grand jury from which members of his own race were shown to have been systematically excluded. An unbroken line of cases, from *Neal* v. *Delaware*, 103 U. S. 370, down through *Pierre* v. *Louisiana*, 306 U. S. 354, *Cassell* v. *Texas*, 339 U. S. 282, and *Eubanks* v. *Louisiana*, 356 U. S. 584, so holds. The same principle serves to vitiate the conviction of a person of Mexican descent when such persons constitute a distinct class and have likewise been systematically excluded from grand juries. *Hernandez* v. *Texas*, 347 U. S. 475.

When, as here, the prospective grand jurors have been literally bombarded with allegations of guilt, when the evidence against a prospective accused has been published in detail by the very victim of his alleged offense, the prejudice is not merely theoretical—compare the dissenting views in *Cassell* v. *Texas*, *supra*—it is very real, and it necessarily destroys impartiality. For here, as in *Delaney* v. *United States*, 199 F. 2d 107, 111 (C. A. 1), "It is fair to say that, so far as the modern mass media of communication could accomplish it, the character of [the defendant] was pretty thoroughly blackened and discredited as the day approached" for his indictment. In view of this Court's grant of certiorari in *Beck* v. *Washington*, No. 40, this Term, there seems no need to labor the matter; Question No. 1 in that case, set forth in the margin, is not substantially different from the first question presented here.[1]

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[1] "1. Where accusation is by a grand jury indictment, does a person (in this case a member and officer of a labor union who at the time of grand jury proceedings was the subject of continuous, extensive, and intensely prejudicial publicity) have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the charges and evidence considered by a grand jury which was fair and impartial or, at least, which was instructed and directed to act fairly and impartially?" 365 U.S. 866-867.

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The differences between this case and that of *Beck* should not, we think, add up to a controlling difference in result. There the adverse publicity emanated from Governmental agencies; here it was originally supplied by State officials, after which it was assiduously developed by the injured parties, the newspapers themselves. There—to judge from the phrasing of Question 1, just set out—the grand jury was neither instructed nor directed to act fairly and impartially; here the grand jury was instructed to disregard the publicity (*supra*, pp. 7-8).

We submit that, in view of the steady flow of adverse matter over the period from February 11 through February 23, and in view of the further fact that the grand jury that indicted petitioner on February 24 on the charge now in question was, as has been seen (*supra*, pp. 6-9), the very same grand jury that had already indicted him on February 13 on the identical charge and in the identical words, it is purest fiction—indeed it verges on the fatuous—to suggest that one simple admonition could have erased from the grand jurors' minds everything that had been pounded into them over a space of nearly two weeks. Human minds, unlike magnetic tapes through which an electric current has been passed, are not thus easily rendered blank.

The same reasons that prompted this Court to review *Beck* v. *Washington* on the grand jury point justify and indeed require review on that issue here.[2]

---

[2] Our insistence that petitioner was entitled to have the accusation against him heard by a grand jury composed of fair and impartial jurors, free of extraneous prejudice, does not in any sense involve invasion of the grand jury's privacy, as the court below seemed to think (Appendix A, *infra*, at page A11). Here that privacy was not disturbed; the adverse publicity was independently proved by excerpts from the newspapers themselves (R. 29-53; see pp. 8-9, *supra*).

Second. Once a defendant is on trial—assuming a valid indictment—public dissemination of the facts in issue raises different problems. Where, as here, the community prejudice and the pretrial publicity is state-wide, a change of venue—as in *United States* v. *Florio,* 13 F.R.D. 296 (S. D. N. Y.)—is unavailing, and the only remedy is by way of a continuance until the effects of the feeling against a defendant have subsided. This was the course declared necessary and proper in *Delaney* v. *United States,* 199 F. 2d 107, where the First Circuit reversed a conviction following refusal of a continuance.

Here petitioner's timely motion for a continuance was denied, in the face of the showing he made, and that denial was condoned by the court below (Appendix A, *infra,* pp. A11-A13), apparently on the view that pretrial by newspaper and television is, in Judge Frank's expression, "an unavoidable curse of metropolitan living (like, I suppose, crowded subways)." *United States* v. *Leviton,* 193 F. 2d 848, 865 (C. A. 2). Here again, the same factors that led to the granting of review in *Beck* v. *Washington* on Question 2 there, set out in the margin, indicate that review on the second question presented in this case is likewise in order.[3]

In the present case, as in *Beck, Delaney,* and *Florio,* "The publicity was intense, critically timed, and indubitably prejudicial." 13 F.R.D. at 299.[4] It is true that, after a

[3] "2. Was the petitioner's right to a fair trial, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, violated where a timely motion for continuance was denied, although inflammatory and prejudicial statements concerning petitioner had been widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, commencing prior to the indictment of petitioner and continuing until the date of trial?" 365 U.S. at 867-868.

[4] In *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2), certiorari denied, 343 U. S. 965, unlike this case and the others just cited, the text of the prejudicial news and publicity releases was not made a part of the record, and so could not be evaluated by the appellate court.

voir dire examination continuing over three days, sufficient jurors were found who announced themselves as unprejudiced. But, as the First Circuit in *Delaney* v. *United States* realistically stated (199 F. 2d at 112-113):

> "No doubt the district judge conscientiously did all he could, both in questions he addressed to the jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to assure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But as stated by Mr. Justice Jackson, concurring, in Krulewitch v. United States, 1949, 336 U. S. 440, 453 * * *: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction.' And see Note, Controlling Press and Radio Influence on Trials, 63 Harv. L. Rev. 840, 842-43 (1950). One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity. This is particularly true in the determination of issues involving the credibility of witnesses."

Similarly the trial judge in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 916, had said:

> "The suggestion was made here also, that the mischief could have been avoided by exercising the right of the Defense to examine, on their voir dire, all prospective jurors and then inquiring as to whether or not they had heard these broadcasts. Well, now, it hardly seems necessary for the Court to say to men who are experienced in the trial of jury cases, that every time Defense Counsel asked a prospective juror whether he had heard a radio broadcast to the effect that his client has confessed to this crime or that he has been guilty of similar crimes, he would by that act be driving just one more nail into James' coffin. We think, therefore, that remedy was useless."

At the very least, to quote Holmes and Hughes, JJ., in a celebrated case (*Frank* v. *Mangum,* 237 U. S. 309, 345, 349), jurors are "extremely likely to be impregnated by the environing atmosphere."

If, therefore, the constitutional freedom enjoyed by the press and by the television industry forbid that they be enjoined or punished when they publicly pretry criminal cases, a defendant is still entitled to a fair trial free from prejudged community sentiment; and the way to resolve the apparent dilemma is to grant the defendant a continuance if he requests one. The gravamen of petitioner's complaint under the present heading is that he was denied the only remedy available to him to undo the harm done by his real accusers—the newspapers. True it is, as one of the trial judges here remarked (Apr. Tr. 48), that "You can't unring the bell." But, at the very least, rudimentary concepts of fairness and due process require a reasonable continuance of the trial to enable "The reverberating clang of those accusatory words" (Cardozo, J., in *Shepard* v. *United States,* 290 U. S. 96, 104) to die away.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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SEPTEMBER 1961.

APPENDIX

APPENDIX

APPENDIX A

OPINION BELOW

No. 6843—May 10, 1961

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

STATE OF OREGON, *Respondent*,

v.

McDONALD, *Appellant*.

Appeal from Circuit Court, Multnomah County.

ALAN F. DAVIS, Judge.

Argued and submitted April 12, 1961.

William B. Murray, Portland, argued the cause and filed briefs for the appellant.

Oscar D. Howlett, Deputy District Attorney, Portland, argued the cause for respondent. With him on the brief was Charles E. Raymond, District Attorney, Portland.

Before McALLISTER, Chief Justice, and ROSSMAN, WARNER, PERRY, SLOAN, O'CONNELL and GOODWIN, Justices.

AFFIRMED.

PERRY, J.

The defendant appeals from a conviction of purposely and maliciously using explosives with intent to injure the property of another.

The evidence in this case discloses that the defendant Levi McDondald was a member of the Stereotypers Union; that this union called a strike against the Oregonian Publishing Company, publisher of the Oregonian, a newspaper of wide general circulation in the city of Portland and the state of Oregon; that the Oregonian is printed in Portland, Oregon, and in order to distribute its newspaper to certain areas in the state the Oregonian Publish-

ing Company entered into an agreement with the George McBreen Truck Company, a contract carrier, to transport its papers. The Publishing Company continued to publish its newspaper despite the strike of the Stereotypers Union and the defendant, who was a negotiator for the union, determined upon a course of harassment of the Publishing Company for the purpose of requiring the Company to suspend its publication, thus forcing it to accede to the union demands. One of his plans was to destroy the trucks which were used to distribute the newspapers. This plan led to the dynamiting of the trucks operated by the McBreen Truck Company and eventually to the defendant's indictment and conviction of the crime of using explosives with intent to injure property of another.

Defendant first contends that ORS 164.830, the statute which creates the offense and prescribes the penalty, is unconstitutional in three particulars:

1. "Under this statute the grand jury may indict, and the court may sentence one person for a felony and another person for a misdemeanor for the same prohibited act."

2. "The statute is so vague it fails to advise the accused of the nature of the charge. From its terms men of intelligence must necessarily differ as to whether the grand jury may indict, and the court may sentence in their unguided discretion either for a felony or a misdemeanor."

3. "The statute, ORS 164.830, is unconstitutional because the legislative assembly may not entrust nor delegate its legislative authority to the unguided discretion of the grand jury, nor to the judiciary, without first establishing fixed rules for the exercise of such discretion."

ORS 164.830 provides:

> "Any person who purposely and maliciously and with intent to injure the person or property of another, sets off or explodes, or attempts to set off or explode, any bomb, dynamite, powder or other explosive, shall be punished upon conviction by imprisonment in the penitentiary for not more than 20 years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than $500, or by both such fine and imprisonment."

Defendant's principal attack upon the statute seems to be based upon the misconception that the grand jury may determine whether or not a person charged under the act may be prosecuted for a misdemeanor or a felony, for he relies upon *State of Oregon* v. *Pirkey,* 203 Or 697, 281 P2d 698. The statute in question in *State of Oregon* v. *Pirkey* (Or Laws 1949, ch 129, § 1) provided that a person "* * * may be proceeded against either as for a misdemeanor or as for a felony, in the discretion of the grand jury or the magistrate to whom the complaint is made * * *," and it was held that such a statute, delegating to the grand jury or magistrate the right to determine in advance of conviction whether the crime committed was a felony or misdemeanor, violated the equal protection clause of the federal and state constitutions.

The statute under which the defendant was convicted makes no provision for a prior determination by the grand jury or examining magistrate as to whether a defendant shall be prosecuted for a felony or a misdemeanor. It only provides that the court in passing sentence may exercise its discretion as to the extent of the punishment to be imposed.

ORS 161.030 provides:

"(1) Crimes are divided into felonies and misdemeanors.

"(2) A felony is a crime which is punishable with death or by imprisonment in the penitentiary of this state. When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution.

"(3) Every crime not included in subsection (2) of this section is a misdemeanor."

This statute clearly points out that where the crime committed is punishable by "imprisonment in the penitentiary * * * [or] by a fine or imprisonment in a county jail," the crime committed is a felony for all purposes until such time as a sentence has been imposed which does not commit the offender to the penitentiary or the Oregon State Correctional Institution. *State* v. *Steagall*, 214 Or 116, 328 P2d 142. It, therefore, follows that the grand jury or magistrate must treat all offenders against the act equally and indict or not indict each for a felony.

The fact that the legislature has granted discretion to the trial court to sentence one offender for a lesser or greater period of punishment does not make the act unconstitutional as denying equality of all persons before the law. *Howard* v. *Fleming*, 191 US 126, 24 S Ct 49, 48 L Ed 121.

We find the foregoing contentions of the defendant without merit.

The defendant assigns as error the refusal of the trial court to quash or dismiss the indictment or grant his motion for a directed verdict of acquittal, because the names of three witnesses were not endorsed on the indictment.

The record discloses the defendant was first indicted for the crime of which he was convicted February 13, 1960. The grand jury had heard three court reporters who were subpoened and gave testimony relative to confessions and admissions made by alleged accomplices of the defendant. Their names were endorsed on this indictment as witnesses. A motion to set aside this indictment was made by the defendant and before a ruling was had on this motion the State moved for dismissal of the indictment. This motion was granted and a new indictment was returned on February 24, 1960, by the same constituted grand jury which had considered the first indictment. The second indictment was the one upon which the defendant was tried and convicted. None of the court reporters were subpoened or appeared and testified when the second indictment was returned. Their names were not endorsed upon the second indictment, nor were they called to testify in the trial of the case.

This identical question was before this court in *State* v. *Andrews,* 35 Or 388, 389-391, 58 P 765, and we stated:

> "The transcript shows that the court sustained a demurrer to the first indictment charging the defendant with the commission of said offense, upon which were indorsed the names of twelve witnesses examined before the grad jury, and ordered the case resubmitted, whereupon the same grand jury returned the indictment involved in this appeal, indorsing thereon the names of two witnesses only. It is maintained by counsel for the state that when an indictment is set aside, and the case resubmitted to the grand jury, a subsequent indictment, found in pursuance of such

resubmission, is a new proceeding entirely, and hence it is necessary to endorse thereon the names of the witnesses only who were examined after the resubmission. The statute requires that when an indictment is found the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court; Hill's Ann. Laws, § 1260. And when the names of such witnesses are not so indorsed or inserted, the court must, upon motion of the defendant, if made at the proper time, set the indictment aside: Hill's Ann. Laws, § 1314; State v. Smith, 33 Or. 483 (55 Pac. 534). Whether the submission of the case to another grand jury after the indictment is set aside is a new proceeding in which the names of the witnesses examined before the former jury should be indorsed upon the indictment is a question the determination of which is not necesary to a decision of the case at bar. The case having been resubmitted to the same grand jury, they must have retained in their memory the the substance of the evidence theretofore given before them, and might possibly have found another indictment without calling a single witness. If this be true, it would necessarily follow, from the principle contended for by the state, that the indorsement of the names of witnesses upon the indictment might be entirely dispensed with, and the provision of the statute thus evaded. The manifest object of the requirement is to inform the defendant upon whose testimony the state chiefly relies for a conviction, so that he may know what evidence he may reasonably expect to be given against him. The statute, being designed to enable a person accused of the commission of a crime to prepare for his defense, should be liberally construed in his favor, and, this being so, the requirement to

indorse upon the indictment, before it is presented to the court, the names of the witnesses examined before the grand jury is mandatory, and the court erred in refusing to set aside the indictment: State v. Pool, 20 Or. 150 (25 Pac. 375); Stevens v. State, 19 Neb. 647 (28 N.W. 304); Parks v. State, 20 Neb. 515 (31 N.W. 5); State v. Stevens, 1 S.D. 480 (47 N.W. 546)."

A re-examination of the statutes and the purposes underlying their enactment lead us to the conclusion that we were then in error.

ORS 132.580 provides:

"When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court."

ORS 135.510 provides:

"The indictment shall be set aside by the court upon the motion of the defendant in either of the following cases:

"• • • • •

"(2) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon."

There can be little question but that the purpose of the requirement of endorsement of the names upon the indictment at the time of presentment is for the purpose of advising the defendant of those persons who will give evidence in the trial against him so that he can intelligently prepare his defense and avoid surprise. *State* v. *Warren*, 41 Or 348, 69 P 679. This is a substantial right that is inherent in the American judi-

cial conception of fair play, but the enforcement for failure to comply with this mandatory requirement rests in the rule that a witness who has appeared before the grand jury may not, if his name is not endorsed on the indictment, testify at the trial over the objection of a defendant. *State* v. *Warren*, supra; *People* v. *Koukol*, 262 Mich 529, 247 NW 738.

In reaching the conclusion in the case of *State* v. *Andrews*, supra, that all witnesses who appeared before the grand jury must be endorsed upon the indictment when presented, the court failed to take into consideration the requirement of ORS 132.320 (formerly § 26-506, OCLA) which provides:

> "In the investigation of a charge for the purpose of indictment, the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question."

This enactment directs the grand jury in its deliberations to consider only such evidence presented before it as would be competent in the trial of the cause. It is well known that many persons may be called to testify before a grand jury and after their appearance it is discovered through their examination that they are unable to give factual knowledge which would be competent in the trial of the cause.

When these statutes are considered together, it becomes clear the legislative intention was to require endorsement of the names of only those witnesses whom the grand jury believes can give competent evidence which will support a verdict of guilty and whose evidence it is expected will be used to confront the accused on the trial of the cause. It would only increase the burden for a defendant to be required to prepare his defense and avoid surprise if names are endorsed on the information whose testimony cannot be used in the trial of the accused. His rights

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are fully protected when he has been informed of the witnesses who will be called to testify against him.

It could not have been the legislative intent to require the doing of an act which would be without benefit to either the State or an accused. Therefore, it appears that the legislative intent was expressed to make the requirement of the statute—that "the names of the witnesses examined before the grand jury must be * * * indorsed thereon"—mandatory only as to those who gave competent evidence upon which an indictment could be returned and who could be used as witnesses in the trial of the cause. 4 Wharton's Criminal Law and Procedure 547, Indictment and Information § 1757.

It then becomes equally clear that the mandatory requirement of section (2) of ORS 135.510 refers to the failure to list the names of sufficient witnesses upon the indictment to support a verdict of guilty if found by a trial jury, not to the failure to endorse the name of some person who has appeared as a witness before the grand jury. When there is a total failure of endorsement, or the failure to endorse a sufficient number of named persons to support a verdict of guilty if found (e.g., where corroboration is required to sustain a conviction), a presumption immediately arises that the grand jury has indicted from bias or mere caprice and not upon competent evidence as required by statute. Such a showing overcomes the presumption of regularity of the proceedings and the statute directs a dismissal of the indictment.

The defendant also assigns as error the refusal of the trial court to sustain his motion to quash the indictment upon which he was tried because the grand jury had heard hearsay evidence when the prior indictment was returned which it could not be expected to ignore, and further, because of the publicity surrounding

the matter, the grand jury could not act in an impartial manner.

The defendant construes ORS 132.320, which we heretofore quoted, in its strict literal sense. It should be remembered that a grand jury is an investigating and accusatory body consisting, not of lawyers and jurists, but of laymen who have no power to determine the guilt of an accused, and we cannot, therefore, believe it was the intention of the legislature to require that the grand jury should hear only such testimony as would be competent in a court of law. We doubt that there are many grand juries which have not been subjected to hearsay testimony during their investigations. This statute is admonitory in character only, not mandatory, advising the grand jury to disregard incompetent evidence in returning an indictment and to consider evidence only of such character that it may be used in the trial to support a conviction of the accused.

Since the function of a grand jury is investigatory and accusatory, an examination of the questions raised by the defendant reveals that the underlying question is the right of a trial court to examine into the deliberations of the grand jury and determine whether or not it heard and considered hearsay testimony or was prejudiced by the publicity surrounding the incidents and upon this basis returned the indictment.

ORS 132.390 provides:

> "The grand jury ought to find an indictment when all the evidence before it, taken together, is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."

There can be no question that when an accusatory indictment is returned there is a presumption that the grand jury has acted in accordance with the admonition of this

statute and ORS 132.320, supra. *State* v. *Belding*, 43 Or 95, 71 P 330. Since, as previously pointed out, this presumption is only overcome when there is a total failure to endorse the names of any witnesses upon the returned indictment, it must follow, under the well-settled rule in the majority of jurisdictions, including the state of Oregon, that the fact a grand jury may have been prejudiced by hearsay evidence or prejudicial publicity which it ought not to consider is not grounds for dismissing or quashing an indictment, for the trial court would then be required to inquire into and determine in advance of each trial the sufficiency of all of the evidence to sustain or reject an indictment, which it may not do. *State* v. *Kelliher*, 49 Or 77, 88 P 867; see Note, 59 ALR 573; 31 ALR 1479.

The defendant also assigns as error the failure of the trial court to grant his motion for a change of venue and for a continuance.

The defendant admitted he was not prejudiced by the failure to grant a change of venue for the reason the publicity surrounding his indictment and arrest permeated the entire state, but he strenuously contends that this same publicity was so inflammatory and prejudicial that at the time he was required to go to trial an impartial jury could not be selected to grant him a fair and impartial trial.

A trial court's ruling upon a motion for a continuance will be disturbed on appeal only for manifest abuse of its discretion. *State* v. *Payne*, 195 Or 624, 244 P2d 1025; *State* v. *Leland*, 190 Or 598, 227 P2d 785; *State* v. *Mizis*, 48 Or 165, 85 P 611, 86 P 361; *State* v. *Hawkins*, 18 Or 476, 23 P 475. And this rule applies where the postponement is asked, as here, for the purpose of a "cooling-off period on the part of the public mind." *State* v. *Sack*, 210 Or 552, 575, 300 P2d 427.

The defendant bases his principal contention upon the fact the newspapers were permitted to publish, prior to

the defendant's trial, detailed confessions made by alleged accomplices of the defendant as to their own and defendant's participation in the bombing of the trucks, and, therefore, these stories must have inflamed the public mind against him. Also, "[t]he District Attorney waited until April 9th, approximately two weeks before the date set for defendant's trial on the newspaper truck bombing charge, to create further adverse public opinion against the defendant by causing him to be indicted for the stink bomb incident in a drug store. The statements Caryl Forbish was reported to have made to investigators and the District Attorney's office incriminating the defendant had been given great publicity which intensified the general public hostility toward the defandant shortly before the present case was due to be heard."

The question of the effect of publicity upon the trial of an accused and how best to protect him from the prejudicial effects thereof has given the courts of this country much concern. See Controlling Press and Radio Influence on Trials, 63 Harvard Law Rev. 840 (1950). Slanted and exaggerated newspaper, radio and television reports of a defendant's activities, both before and subsequent to his accusation of a crime, undoubtedly, to some extent, adversely effect an accused in his defense. The full extent of this effect is for the time being a matter of conjecture. There is at this time no provision of law to subject each judge and juror to a psycological examination. The Judge and prospective jurors are all human beings, subject to all of the frailties of human nature, but until such time as a more exact method of determining the psychological effect of such prior reports and the length of time that must elapse before the average human being's reaction thereto is completely deadened is discovered, the courts to a large extent in setting the time of trial must rely upon their own impressions of the existing situation.

However, there is nothing in the record before us that indicates the prior newspaper, radio and television expose

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created a hostile atmosphere that carried over into the trial. The trial court permitted extensive examination of each prospective juror as to what he had read and heard concerning the case and as to the influence it might have upon him as a juror. We must presume, as did the trial court, that the answers of each juror were honestly given. Therefore, while pretrial publicity prevents an idealistic approach to the trial of a person accused of a crime and is to be deplored, it cannot be said in this case that the publicity was so inflammatory or so slanted that an honest and impartial jury could not be selected whereby the defendant could receive a fair and impartial trial at the time he was tried, or that the trial was not conducted in "an atmosphere of judicial calm." 14 Am Jur 853, Criminal Law § 130.

The defendant also contends that the trial court erred in permitting a witness, Caryl Roger Forbish, to testify that at the instigation of and with the aid of the defendant a stink bomb was set off in a drugstore in the Oregonian Building, because the owners of the drugstore were not in sympathy with the strike.

It is the contention of the defendant that this particular crime was not germane to the question of whether or not he was guilty of the crime with which he was charged in the indictment, thus violating, to his prejudice, the rule set forth in *State* v. *La Jesse*, 132 Or 401, 286 P 149, *State* v. *Ewing*, 174 Or 487, 149 P2d 765, and *State* v. *Jensen*, 70 Or 156, 140 P 740.

The record discloses that the witness Forbish had been well-acquainted with the defendant for several years; that on several occasions they discussed various means and methods of causing harm to the Oregonian Publishing Company, for the purpose of causing it to suspend publication of its newspaper. The witness testified as follows:

"Q. All right. In early December, I will put it, do you recall McDonald discussing with you anything

concerning making any—conducting any harassment of The Oregonian Publishing Company?

"A. Not to The Oregonian itself.

"Q. Well, in what regard?

"A. Harassing the drugstore.

"MR. CARNEY: Now, your Honor, I object to that if this has to do with a matter which a different offense than that charged in this indictment, and we object to this line.

"THE COURT: I have already ruled on it and I am overruling your objection and you may proceed.

"MR. CARNEY: May I have a continuing objection?

"THE COURT: Yes, you do.

"Q. (By Mr. Howlett) Will you relate, if you can, when and where and under what circumstances the Defendant McDonald conversed with you on that subject?

"A. Well, it was—oh, there were different occasions where it was discussed, but he didn't feel too friendly toward the people who ran that drugstore in The Oregonian Building.

"Q. What did he say specifically in that regard?

"A. Well, he wanted to do something to get even with them because he felt that they were siding with the strikebreakers, and, oh, eventually he talked about throwing some type of a liquid in there.

"Q. Did you have any discussion with him on other subjects in December?

"A. Yes.

"Q. What subjects?

"A. In December we discussed doing something to the trucks at Johnston Brothers Trucking Line which are contract carriers for the paper. We talked of doing something to put the trucks out of commission for a while.

"Q. Was anything specific discussed in the regard?

"A. Well, we talked of using ballbearings, metal

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filings, and things like that, using them in the crankcases and in the mechanical system. Sugar and—possibly sugar or pyrene or something in the gas tanks just enough to halt them.

"Q. And did he ever say for what reason?

"A. Well, he believed that if the trucks were put out of commission, well, the papers wouldn't get out like they were supposed to and would possibly make the papers come around to the Union's side.

"Q. Now, do you recall any specific conversation regarding the use of some type of acid or stink bomb in the ventilating system?

"MR. CARNEY: Now, your Honor, we make the same objection to this matter.

"THE COURT: You can have a continuing objection. You will be overruled. Your questions are leading, Mr. Howlett; now, I am going to have to sustain them on the question of leading in the form of your questions.

"Q. (By Mr. Howlett) Do you recall any specific conversation about using anything with respect to harassing the employees in The Oregonian?

"A. Yes.

"Q. All right. Will you tell the jury about that?

"A. At various times we discussed the idea of using hot water bottles with a tube on them. I don't exactly know what the dickens they would be called, but filling those hot water bottles with some type of liquid, really yet unknown, and then placing the tube into the ventilation duct on the outside of The Oregonian Building and letting that liquid run into the air-conditioning unit and go through the whole building.

"Q. Did he discuss how he was going to hold this apparatus up?

"A. We decided on using large suction cups with hooks on them which you could just hang the hot water bottles on and they would be placed against the side of the building.

"Q. Was there any investigation in this matter as to what you could use in this regard?

"A. Not to any real great extent. At one time as a joke I suggested using skunk oil.

"Q. Did anybody pursue that?

"A. Well, Mr. McDonald suggested I call some of the laboratories and see whether it would be possible to get some.

"Q. Did you?

"A. I called some laboratories and there was one that I called, I can't remember the name of it, but they said that they did have skunk oil there and that they had it in quarts or gallon size; I have forgotten what the price was and everything on it.

"Q. Well, what was the purpose of putting this in the ventilating system?

"A. Well, that was something to make the employees inside the building sick so they couldn't carry on with their work and that would slow the paper down, too.

" * * * * *

"A. Well, as I say, there was a discussion on using metal filings, ball bearings, and stuff, and we had a lot of discussion on how the dickens you would take—you'd have to have the stuff in a sack or something to get inside the fence, and there was a lot of discussion on how you would be able to get all that stuff in there, because you would have to have a car to carry an awful lot of it to take care of fifteen trucks, and we discussed ways of trying to get into the area. We figured on cutting a hole in the bottom of the fence and crawling in or maybe snapping the padlock on the gates and then substituting another padlock, but they were both turned down because there was too much work involved and too much time.

"Q. Was there ever any discussion concerning the need for additional help?

"A. Yes, because I felt that as McDonald and I talked about it, I believe he was looking to me to take care of the whole thing, and there just—it was too big an area for one man to cover. You couldn't—

"Q. Now, let me interrupt you and ask you this question: Did McDonald ever approach you, and if your answer is 'yes,' will you state when and where, concerning using force against strikebreakers?

"A. Well, when I was first—when we first talked about even using the hot water bottles—

"MR. CARNEY: Your Honor, I assume we have a continuing objection to these questions with respect to other matters, other than trucks, using force against strikebreakers and stink bombs and that sort of thing?

"THE COURT: I will give you a continuing objection to it all, that's correct, and I will overrule your objection. However, there may be a time when you should object and that I will sustain you. I don't know when that will be, so when you think that time arrives, you better object. If you don't I will go ahead.

"Q. (By Mr. Howlett) All right, proceed.

"A Well, when we first even started discussions on hot water bottles in the ventilating system, why, Mr. McDonald asked me if I felt like making some money and I said I'd like to and he said, 'Well, you may have to defend yourself.' And when I asked him what he meant, well he didn't say, but I asked him would it be in defending mayself against some person or persons, and he said, 'Yes.' And I told him, well, I didn't want to have anything to do with it, then, because I am not the type that goes around fighting people, and that's all there was on that."

Later the witness testified as follows:

"Q. Now, directing your attention to January 12th of 1960, did you have occasion to see the defendant, Levi McDonald?

"A. Yes, I did.

"Q. Will you state where you first saw him on that date?

"A. At his home.

"Q. And what took place? Did you have any conversation with him?

"A. Yes, we had been discussing the stink bomb in The Oregonian Building—

"MR. TANNER: That's repetitious.

"THE COURT: Let's get down to the facts. This has been all gone over already, Mr. Howlett.

"THE WITNESS: And at that time—

"THE COURT: Let's don't keep repeating all this. Let's get on with it.

"THE WITNESS: At that time he told me that he had the chemicals to use for the stink bomb in the garage of his home, which he did.

"Q. (By Mr. Howlett) All right. Did he show you any?

"A. Yes, he did.

"Q. What did he show you?

"A. There was a box out in the garage containing various bottles and a lot of excelsior padding more or less to protect them.

"Q. All right. What happened? What did you do? What did you talk about?

"A. Well, we had decided about using heavy balloons like the type the children play with and filling them with the liquid from the bottles and holding onto the neck of the ballon and tossing it into the drugstore. Then we went down to one of the department stores downtown, I don't remember which one, and bought two heavy balloons and took them back to his house. We spent some time in the house using tap water, just hooking the neck of a balloon over the faucet just to spread out the balloon and to check it to see if it would hold weight and it seemed to work out all right.

So in the early evening it was decided to test the balloons with the liquid in them and he went out—we got one balloon and one type of liquid, I don't know exactly what it was, and went out in the backyard next to his incenerator where he filled up the balloon and it held for a couple of seconds, then the bottom fell out of it. It was either too heavy or maybe the material ate through the balloon, I don't know which, and so he decided to try the other balloon. And we went back to the garage and he poured liquid from another jar into the other balloon and it burst on the garage floor. And he then took cleaning solvent, gasoline, water, and tried scrubbing the floor and trying to get all of that liquid outside where it would be in the air just to blow away, more or less.

"Q. All right. That night did you do anything in respect to acid or chemical substance?

"A. Yes.

"Q. What did you do?

"A. It was, oh, between about—I guess it was about 10:30 McDonald asked me, 'Well, do you want to go ahead and get it over with?' So I figured, all right. might as well.

"Q. Did he offer to pay you for this work?

"A. Yes, but there wasn't any sum—

"Q. Mentioned?

"A. —mentioned on it.

"Q. All right, go ahead. And what happened?

"A. And I went home and got an old green heavy jacket with a parka on it that I had had for a few months. I decided to wear that, it would be good in a disguise, so-to-speak, and, of course, the weather was still kind of cool out because there was a little bit of snow left and everything. And I went back over to McDonald's where he handed me a pair of gloves and put the sack—I mean, put the jar in a sack just to hold onto it and we climbed into the car. Well, he took the

jar out of the sack, unscrewed the lid, and then tightened it back up again. He said that would break the seal on the lid so it would open easier. And he also warned me not to get any of the stuff on my clothes because it would smell like the dickens. And so we went downtown and went around The Oregonian Building, either once or twice, I don't know exactly which and then he stopped on the corner of 6th and Jefferson in the dark area and said, 'I will wait here for you.' So I put my glasses in the car and at the time I was wearing a moustache. And I went up to the drugstore and walked inside to go up into the area to see exactly how many people there were inside. And I walked over to the card counter for a couple of minutes and an elderly woman came over and asked me if there was anything I wanted and I said. 'No, I was just looking,' and I just went outside again to see if there were any police on the street. And it seemed like it was fairly quiet. So I opened the door from the outside and held it open with my foot and taking the jar out of the sack, I unscrewed the lid and rolled the jar so it would hit right at the landing on the top steps and spill the liquid. I had been advised by McDonald just to throw the jar against the wall so it would shatter, and I felt that wouldn't be much help because it was felt that somebody might be injured by flying glass or something, and that was bad. As soon as I rolled the glass, I started to roll away, walk away, and I heard the sound of breaking glass and I found out later that it had rolled into a showcase and broken. But I went back over across the street on Jefferson and went down to the car again and we left and went over to McDonald's home."

No specific objection was made to the testimony relative to the defendant's actual participation in the crime relative to the throwing of the stink bomb. The reasoning sustain-

ing the rule of a continuing objection is based upon the proposition that "when an objection has once been acted upon and overruled it need not be repeated to the same class of evidence since it may be *assumed* that the trial court will adhere to the ruling throughout the trial." The objection, however, has efficacy only when the adverse ruling was erroneous. *Noteboom* v. *Savin*, 213 Or 583, 589, 322 P2d 916, 326 P2d 772.

There is no doubt that all of the testimony sought to be suppressed was properly admitted by the trial court. While the witness testified the action of the defendant in causing the stink bomb to be placed in the drugstore was not to harass the Oregonian Publishing Company, but because "he didn't feel too friendly toward the people who ran that drugstore in the Oregonian Building," it is evident, when considered with the other testimony given, this particular act was a part of the overall design to make more effective the strike against the newspaper.

The record in this case clearly shows that to make effective the strike was the motive which led to the commission of the crime of which the defendant was convicted. Evidence which shows the commission of other or collateral crimes is always admissible if this other evidence tends "to show motive, design or purpose for the crime charged." *State* v. *Long*, 195 Or 81, 116, 244 P2d 1033. This rule of law was fully explored by Mr. Justice BRAND in *State* v. *Long*, supra, and fully controls under the facts in this case so that the exclusionary rule relied upon by defendant does not apply. See also *State* v. *Estabrook*, 162 Or 476, 81 P2d 838; *State* v. *Gillis*, 154 Or 232, 59 P2d 679.

The defendant sets forth other assignments of error which we have carefully examined and find so lacking in merit we deem it unnecessary to discuss them herein.

Finding that the defendant received a fair and impartial trial in which no error was committed, the judgment is affirmed.

APPENDIX B

JUDGMENTS BELOW

(1) Judgment of Affirmance

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 6th day of MARCH 1961, WHEREUPON on this WEDNESDAY, the 10th day of MAY 1961, the same being the 27th judicial day of said term, * * * the following proceedings were had:

STATE OF OREGON, *Respondent*

v.

LEVI S. McDONALD, *Appellant*

Appeal from MULTNOMAH County
No. C 38 717

This cause on April 12, 1961, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the Court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same is in all things affirmed.

IT FURTHER IS ORDERED that respondent have and recover from appellant its costs and disbursements in this Court taxed at $

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

(2) Judgment Denying Rehearing

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the court-room in the city of Salem on the first Monday, the 6th day of MARCH 1961, WHEREUPON on this TUESDAY, the 13th day of JUNE 1961, the same being the 36th judicial day of said term, * * * the following proceedings were had:

STATE OF OREGON, *Respondent*

v.

LEVI S. McDONALD, *Appellant*

Appeal from MULTNOMAH County

The Court having duly considered appellant's petition for rehearing and the Court being fully advised therein,

IT HEREBY IS ORDERED that such petition be and the same hereby is denied.

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AUTHORITIES

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Oregon Revised Statutes, 164.830	3
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

LEVI S. McDONALD, *Petitioner,*

v.

STATE OF OREGON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

LEVI S. McDONALD, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on October 18, 1961.

OPINION BELOW

The opinion of the Supreme Court of Oregon (Appendix A, *infra,* pp. A1-A8) is reported at 73 Oregon Advance Sheets 337 and at 365 P. 2d 494.

JURISDICTION

1. The judgment of the Supreme Court of Oregon (Appendix B, *infra,* p. A9) was entered on October 18, 1961. A timely petition for rehearing was denied on November 14, 1961 (Appendix B, *infra,* p. A10).

2. The Federal question was raised as indicated at pp. 7-8, *infra.*

3. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, where the accusation is by indictment, the repeated publication in the newspapers and in broadcasts on television of generalized statements of petitioner's guilt, as well as similar publication of statements of witnesses who implicated petitioner, which statements had been supplied by State officers, so far prevented the grand jury from acting as a fair and impartial body, when finding the indictment against petitioner, as to have denied him equal protection and due process of law.

2. Whether the denial of petitioner's timely motions for a postponement of a trial because of widespread community prejudice against him, created by adverse newspaper and television publicity that had been intensively disseminated throughout the State, commencing prior to his indictment, continuing for nearly four months thereafter, and including reports of his trial and conviction for a similar offense in the adjoining county, so far deprived him of a fair trial as to have denied him due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitutional provisions basically involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment, both of which are sufficiently familiar to the Court as not to require quotation.

2. This case does not turn on the terms of any Oregon statute referred to in the course of this petition.

STATEMENT

This is a companion case to *McDonald* v. *Oregon*, No. 395, this Term, now pending on petition for a writ of certiorari, involving the same individual.

In No. 395, petitioner was indicted, tried and convicted in Multnomah County, for setting off and exploding a quantity of dynamite on January 31, 1960, with intent to injure

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four trucks, the property of The Hertz Corporation, which were leased to and operated by *The Oregonian-Oregon Journal*, two newspapers there circulated together, in violation of O.R.S. 164.830, and sentenced to pay a fine of $500 and to serve an indeterminate sentence of not to exceed ten years.

In this case, petitioner was indicated, tried and convicted in Clackamas County—just south of Multnomah County, Oregon City, the former's county seat, being less than 10 miles away from Portland, the latter's county seat—for similarly setting off and exploding a quantity of dynamite on the same day, January 31, 1960, with intent to injure six trucks, the property of Eugene D. Wymore, similarly leased to and operated by the same newspapers, in violation of the same statute (R. 1).[1]

In this case, the judgment against petitioner was a sentence to confinement "for an indeterminate period not to exceed ten (10) years, and that said sentence shall run *consecutively* with the sentence heretofore imposed by the Circuit Court of Multnomah County • • • (R. 67). [Italics added.]

The first Multnomah County indictment was returned on February 13, 1960, the second on February 24; the present Clackamas County indictment was returned in the interim, on February 18 (R. 1).

The Multnomah County trial took place on May 3 to 10, inclusive, in Portland, the present trial commenced on June 20 (Tl. Tr. 3, 72), in Oregon City.

As in No. 395, no question is raised concerning any issue other than the quantum and effect of the newspaper and

---

[1] The record in the present case is unprinted. "R." refers to the basic file of court papers. "Tl. Tr." refers to the typewritten volumes of the Trial Transcript, which also contain the proceedings on petitioner's motion for postponement. "Tr.," with an indication of the date, refers to the typewritten transcripts of the proceedings on the other pre-trial motions.

television publicity adverse to petitioner on (a) his indictment by grand jury and on (b) his request to postpone his trial until the effects of that publicity, plus the effects of the publicity concerning his Multnomah County trial and conviction, had been dissipated.

A. The first publicity directed at petitioner

In the interest of shortening the present document, the facts set forth at pp. 4-7 in the Petition in No. 395 are incorporated by reference.[2] The newspaper accounts there referred to are summarized and appear as exhibits to the affidavits by King (R. 5-25) and petitioner (R. 52-58) in this case.

After the date of those accounts, on February 18, 1960, petitioner was indicted in Clackamas County (R. 1); he moved to quash the indictment on the ground that the grand jurors were so influenced by the adverse publicity that they could not act as a fair and impartial jury, in violation of the Fourteenth Amendment (R. 3, ¶¶ 3, 4); and that motion was denied on March 11 (R. 27; Mar. 10 Tr., p. 48).

B. Publicity directed against petitioner during his trial and conviction in neighboring Multnomah County

Following his conviction in Multnomah County, petitioner moved, based on the Fourteenth Amendment, for a change of venue or postponement of trial (R. 50),

> " on the ground and for the reason that the defendant can not have a fair and impartial trial in Clackamas County, Oregon, or in any other county in the State of Oregon at this time nor for a period of a number of months until the publicity and public opinion against the defendant has subsided for the reason that there has been hostile publicity against the defendant with respect to the charge upon which the defendant is to be tried herein since February 11, 1960, almost continuously until the present time, and for the further

[2] A copy of that petition has been served on counsel for the respondent, together with the present document.

reason that the State of Oregon, during the month of May, 1960, caused the defendant to be tried before a jury in Multnomah County, Oregon, upon a charge arising out of the same transaction involved in this case, which trial and the sentencing of the defendant in Multnomah County, Oregon, caused great and widespread publicity which, when taken in connection with the previous publicity against the defendant, would prevent him from having a fair and impartial trial herein."[3]

This motion was supported by petitioner's affidavit (R. 52-58), which summarized newspaper articles from February 12 to June 16, 1960, inclusive; by affidavits of 23 citizens of Clackamas County expressing the opinion that petitioner could not have a fair trial there or anywhere else in Oregon "until the effects of this publicity subside" (R. 59-62); by oral testimony (Tl. Tr. 13-52) and by exhibits consisting of newspapers, photographs, film strips, and television scripts (Def. Ex. 1-24); and by a showing of the films that had previously been exhibited on television (Tl. Tr. 55).

In addition to the newspapers and television items considered in the earlier case (Pet., No. 395, pp. 10-13), the following items, subsequent in date to those just mentioned, were presented in this case:

Television scripts dealing with petitioner's Multnomah County trial in Portland, that gave full details of the testimony against him (Def. Ex. 17, 21), plus others that consistently referred to him as "accused [later "convicted"] of master-minding dynamiting of trucks that hauled for Portland's two struck daily papers" (Def. Ex. 24, Apr. 21, May 2, May 3, May 16) or as "accused of plotting the blasting of the trucks" (*id.*, May 5, 6, 9, 10). Many of these scripts gave summaries of the actual prose-

[3] Petitioner's defense of double jeopardy, pressed both at the trial (R. 41-48, 64-65) and on appeal (*infra*, pp. A2-A8), is not in issue now.

cution testimony admitted against him at the trial (*id.*, May 5, May 6, May 9).

Both newspapers (Def. Ex. 1, 3) also printed extensive excerpts from the trial testimony adduced against petitioner, the purport of which is indicated by the following headlines (R. 57-58):

"Prosecutor Opens State's Case, Notes McDonald Had Motive, Design"; "Key Bombing Witness Not Cross-Examined"; "Jury Hears Bombing Witnesses"; "McDonald Stony Faced as Accuser Tells Story of Truck Dynamiting"; "Liquid Throwing Described"; "McDonald Described as Plotter"; "Witnesses Say McDonald Plotted Many Ways to Force Strike End"; "Series of Witnesses Affirm Bomb Story"; "Bomb Case Near Jury; No Defense Witnesses"; "Bomb Trial Witnesses Take Fifth"; "Union Man Admits Aid in Blast"; "McDonald Guilty, Hears Fate Friday"; "McDonald Draws Ten Year Term for Bombing."

Shorter accounts appeared in the Clackamas County newspaper, the Oregon City *Enterprise-Courier* (Tl. Tr. 50; Def. Ex. 22).

The prosecution produced no evidence in support of its opposition to petitioner's motion for a continuance (Tl. Tr. 56; R. 63). None the less, the trial judge denied the motion (Tl. Tr. 67-69; R. 63), and the trial proceeded.

Five jurors were excused because of preconceived opinions (Tl. Tr. 79), and 27 more were examined (Tl. Tr. 81-228) before a jury could be empaneled.

The trial itself took three full days thereafter, and resulted, as has been noted, in a conviction (Tl. Tr. 884-885; R. 66), in which a consecutive sentence of up to 10 years was imposed (Tl. Tr. 893; R. 67).

On appeal, so far as here material, the Supreme Court of Oregon affirmed (R. 75), referring simply to the reasons set forth in its earlier opinion, 361 P. 2d 1001, now pending on petition for writ of certiorari, No. 395, this Term (*infra*, pp. A1-A2). A timely petition for rehearing was denied (R. 74).

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HOW THE FEDERAL QUESTION WAS RAISED

1. *Grand Jury Point.* (a) Par. 4 of petitioner's motion to quash the indictment (R. 3), summarized at p. 4, *supra,* invoked the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This motion was denied (R. 27).

(b) That denial was the subject-matter of petitioner's Seventh Assignment of Error in the Supreme Court of Oregon, which duly invoked the Fourteenth Amendment (p. 116 of item 58 in petitioner's praecipe, and transmitted here, see R. 87).

(c) The opinion of the Supreme Court of Oregon (*infra,* pp. A1-A2) considered and denied the foregoing Federal claim, on the authority of its decision on petitioner's other appeal.

(d) Petitioner renewed this contention at pp. 51-57 of his Petition for Rehearing (item 62 in petitioner's praecipe, and transmitted here, see R. 87).

(e) The petition for rehearing was denied (R. 74), rendering the conviction final.

2. *Failure to grant continuance.* (a) Petitioner's motion for a continuance (R. 50), the operative portions of which has already been quoted, *supra,* pp. 4-5, invoked the Fourteenth Amendment. This motion was also denied (R. 63).

(b) That denial was the subject-matter of petitioner's Eighth Assignment of Error in the Supreme Court of Oregon, which duly invoked the Fourteenth Amendment (p. 139 of item 58 in petitioner's praecipe, and transmitted here, see R. 87).

(c) The opinion of the Supreme Court of Oregon (*infra,* pp. A1-A2) considered and denied the foregoing Federal claim, on the authority of its decision on petitioner's other appeal.

(d) Petitioner renewed this contention at pp. 57-68 of his Petition for Rehearing (item 62 in petitioner's praecipe, and transmitted here, see R. 87).

(e) The petition for rehearing was denied (R. 74), rendering the conviction final.

REASONS FOR GRANTING THE WRIT

The same reasons for granting certiorari that were presented in respect of petitioner's Multnomah County conviction in No. 395, to which the Court is respectfully referred, and which at this juncture are incorporated by reference to avoid repetition, are applicable to and require review of this case also—but with one significant difference, which makes the present case an even stronger one:

There the newspaper and television publicity implicated petitioner in advance of a trial at which both sides could be heard; here the actual trial testimony also was brought to the attention of the public just as if every reader of the papers and every viewer at the television screen had actually been in court, listening to the evidence and witnessing petitioner's conviction. Thus the details of the testimony on which the Clackamas County prosecution would rely were common knowledge, while the television newscasters, with the cumulative impact of a refrain, were referring to this petitioner as "master-minding" and "plotting" the bombing of the trucks (*supra*, pp. 5-6).

Consequently, by the time his Clackamas County trial began, he had been twice pre-tried in the press and on television—once before his Multnomah County trial, and once during that trial.

Petitioner was held not to have been in double jeopardy, inasmuch as he was here convicted of damaging different trucks on the other side of a county line. But the evidence in both cases, which was substantially identical, showed that both cases arose out of a single expedition on a single night. The newspapers and the television stations did not sep-

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arate the two offenses, and the public could not. Indeed, so far as the impact on Clackamas County was concerned, that community was as thoroughly informed on what had gone on in the Multnomah County courthouse, a bare ten miles away, as if all had actually been present there throughout.

Petitioner's Clackamas County indictment had been thoroughly pretried in every Multnomah County news medium long before it started—with the assistance, be it noted, of the local Clackamas County newspaper as well (Tl. Tr. 50; Def. Ex. 22). Petitioner should therefore have been granted a continuance as prayed, "until the publicity and public opinion against this defendant has subsided" (R. 50). Since, however, that relief was denied him, the resultant conviction, pursuant to which a consecutive sentence of up to ten years' additional confinement was imposed, deprives him of due process of law, in violation of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1962.

APPENDIX

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APPENDIX A

OPINION BELOW

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

STATE OF OREGON, *Respondent,*

v.

LEVI SARFIELD McDONALD, *Appellant.*

• • • • • • • • • •

Appeal from Circuit Court, Clackamas County.

Val D. Sloper, Judge.

Argued and submitted June 5, 1961.

William B. Murray, Portland, argued the cause and filed briefs for the appellant.

William E. Schumaker, District Attorney, and Donald B. Bowerman, Deputy District Attorney, both of Oregon City, argued the cause for respondent. With them on the brief was Robert Y. Thornton, Attorney General, Salem.

Before McAllister, Chief Justice, and Rossman, Perry, Sloan, O'Connell, Goodwin, and Lusk, Justices.

PERRY, J.

Affirmed.

PERRY, J.

The defendant Levi Sarfield McDonald, a former employee of the Oregonian Publishing Company, was convicted by a Clackamas county jury of the crime of maliciously damaging personal property by explosives, and prosecutes this appeal to reverse the judgment of conviction.

There are sixteen assignments of error. All assignments except three are identical in fact and nature with those

considered to be without merit in the case of State v. McDonald, ... Or . . . ., 361 P2d 1001. The decision in that case is determinative of the thirteen assignments of error in the present case and, although reconsidered by the court, our reasoning will not be again reiterated in this opinion.

The remaining assignments of error are directed to the refusal of the trial court to submit to the jury for its consideration defendant's attempted plea of former jeopardy.

The basis of defendant's contention of former jeopardy lies in the fact he was convicted on an indictment returned by the grand jury of Multnomah county, which reads as follows:

> "LEVI MCDONALD is accused by the Grand Jury of the County of Multnomah and State of Oregon by this indictment of the crime of INJURY TO PROPERTY BY EXPLOSIVES committed as follows:
>
> "That said LEVI MCDONALD on the 31st day of January, A.D. 1960 in the County of Multnomah and State of Oregon, then and there being, did then and there unlawfully and feloniously, purposely and maliciously, set off and explode a quantity of dynamite with intent then and there on the part of the said LEVI MCDONALD to then and there injure: one 1954 White truck, one 1955 International truck, one 1956 International truck, and one 1957 International truck, the personal property of another, to-wit: The Hertz Corporation, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon.
>
> "Dated at the City of Portland, in the County aforesaid, this 24th day of February A. D. 1960.
>
> "Charles E. Raymond, District Attorney
> "By Glenn A. Guerts, Deputy.
>
> "Witnesses examined before the Grand Jury: William Howard McGill, Francis Edgmon, Caryl Forbish, Earl

C. Adams, Dwight Gordon, Eugene Wymore, Marcus William Brooks, Oran Lyle Hull, Jane Snyder, Ruth Alys Snyder, Janis Buis"

The indictment returned against defendant by the grand jury of Clackamas county reads as follows:

"Levi Sarfield McDonald is accused by the Grand Jury of the County of Clackamas, State of Oregon, by this indictment of the crime of INJURY TO PROPERTY BY EXPLOSIVES committed as follows:

"The said Levi Sarfield McDonald on or about the 31st day of January, A.D., 1960, in the said County of Clackamas and State of Oregon, then and there being, did then and there purposely, maliciously, feloniously and with intent to injure the property of another, to-wit: six (6) van type trucks, owned by Eugene D. Wymore, set off and explode dynamite, said act of defendant being, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

"Dated at Oregon City in the County aforesaid, this 18th day of February, A.D., 1960.

"Witnesses examined by the Grand Jury and for the State of Oregon: Eugene D. Wymore, Niel C. Doane, George Fatham, Francis C. Edgmon, Caryl R. Forbish, Wm. Brooks, Bernice Lee, Oran Lyle Hull, E. Lloyd Holt, Jane Snyder, Ruth Alys Snyder.

"(sgd) Winston L. Bradshaw
District Attorney."

At his arraignment in the circuit court for Clackamas county, the defendant entered a plea of not guilty and also (as authorized by ORS 135.830(3)) the plea that he had already been convicted of the crime charged in the indict-

ment, setting forth the judgment of conviction rendered in the circuit court for Multnomah county.

The trial court at first accepted the pleas as made and then on motion of the State struck the plea of former jeopardy, the effect of the trial court's action being to reject the plea of former jeopardy.

Whether or not the trial court properly rejected the defendant's plea of former jeopardy depends upon whether or not each indictment on its face discloses as a matter of law a separate and distinct offense. "* * * All the writers seem to concur that a plea of former conviction or acquittal must be 'upon a prosecution for the same identical act and crime': 4 Blackstone's Commentaries, *336." State v. Howe, 27 Or 138, 140, 44 P 672.

Crimes to be identical must be the same in law and in fact. State v. Sly, 4 Or 277.

In State v. Weitzel, 157 Or 334, 340, 69 P2d 958, and State v. Stewart, 11 Or 52, 53, 4 P 128, we quoted with approval the following from Moray v. Commonwealth, 108 Mass 434:

> "'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal, or conviction, under either statute, does not exempt the defendant from prosecution and punishment under the other.'"

Thus, to constitute a valid plea of former jeopardy, two distinct factors at least must be shown to concur—the same act and the same statutory offense.

An examination of the indictment discloses that the same identical crime in law is charged in each indictment so we must consider whether or not the same act or acts is charged.

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In identifying whether or not the act or acts charged constitute single or multiple crimes, the courts apply two tests. The first, and prevailing rule in the majority of jurisdictions, is known as the "same evidence test."

"* * * For instance, it is often said and stated as a test that a conviction or acquittal upon one indictment is a bar to a subsequent prosecution upon another, when the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first, and this is the rule principally relied upon by the defendant in this case. But it must be accepted with some qualification, and as true only in a general sense. Thus, if after a conviction of assault and battery, the injury resulted in death, the defendant, it is held, may be prosecuted for manslaughter or murder, although, under the facts set out in the second indictment, he might have been convicted of the crime charged in the first: 1 Bishop's New Criminal Law, § 1059. So, too, in prosecutions for the unlawful sale of intoxicating liquors, each sale constitutes a separate offense, and although both indictments charge a sale to the same person, and the prosecution could support either by the same evidence, inasmuch as the date is immaterial, yet a prosecution on one would not be a bar to the other, unless it was for the same act of selling: State v. Ainsworth, 11 Vt. 91. So also where each obstruction of a highway by a railway company constitutes a distinct offense, an acquittal on the trial of one indictment is not *ipso facto* a bar to another, found at the same time and charging the same character of offense as having been committed on the same date, although the same evidence would have supported a conviction on either at the election of the prosecution. But in such case it is only a bar to a prosecution for such offense as was proven or attempted to be proven on the trial of the first indictment: Chesapeake Railway Company v. Commonwealth, 88 Ky. 368 (11 S.W.

87). So, then, it cannot be said that the rule suggested affords an infallible guide." State v. Howe, 27 Or 138, 143, 44 P 672.

The second test applied quite sparingly and known as the "same transaction test" is also referred to in State v. Howe, supra, 27 Or 138, 144:

> "Another rule sometimes adopted is that the conviction or acquittal on one indictment will be a bar to another prosecution growing out of the same transaction. But this also must be taken as true in a general sense."

The same transaction is usually to be found in a continuing crime. Such a crime has been defined as a "continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may operate." Armour Packing Co. v. United States, 82 CCA 135, 153 F 1, aff 205 US 56, 52 L ed 681, 28 S Ct 428. An example of a crime of this nature is to be found in the continuous and uninterrupted transportation of the same identical liquor through several counties. State v. Shirman, 122 Ohio St 522, 172 NE 367, 73 ALR 1502.

Also, in larceny cases it has been held in the majority of jurisdictions that the stealing of property from different owners at the same time and place constitutes but one larceny. State v. Clark, 46 Or 140, 80 P 101; 28 ALR2d 1182.

It is apparent from a cursory examination of the indictments that the defendant's contention of double jeopardy will not meet the spirit of either of these tests. On their face, each shows that the evidence required to convict the defendant of the crime in Multnomah county would not convict the defendant of the crime charged in Clackamas county and vice versa.

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Each indictment charges a separate and distinct act of violence at separate and distinct places against the property of different individuals and different property. Therefore, the plea does not meet the "same transaction test."

Proof that the defendant had exploded dynamite to destroy personal property in one county might be evidence of motive to injure property in another county, but it would not disclose the separate overt acts which would be necessary to sustain a conviction in each county, and, therefore, does not meet the "same evidence test."

The defendant also contends the trial court erred because after the State had rested the trial court denied his motion for a directed verdict of acquittal and his motion to submit to the jury his plea of former jeopardy.

These motions will be considered as one since the motion for acquittal rests on defendant's contention of former jeopardy.

The defendant contends that the evidence adduced at the trial in Clackamas county was the same as that introduced in the trial in Multnomah county. It is true the same witnesses testified to many of the same facts in each case, but the facts which disclose the ultimate overt act are in each case different. Edward and Charles Snyder exploded the dynamite in Clackamas county, but others actually exploded the dynamite in Multnomah county.

The defendant seems to be under the impression that, because he was in fact only an accessory before the fact and did not himself explode any of the dynamite, his planning and procuring the execution of both explosions was but a single crime. The fallacy of this claim is at once apparent. The defendant confuses motive with criminal intent.

While ORS 161.220 abolishes the common-law distinction between accessories before the fact and principals by pro-

viding that the accessory before the fact as an aider and abettor in the crime committed shall be indicted and tried as a principal, it does not attempt to in anywise change the general rule of law which requires that a crime must in fact have been committed by the act of another before one who has only aided and abetted can be guilty of the crime.

> "* * * It is the intent of him that counsels or procures another to violate the law, coupled with the intent and act of the person who in pursuance thereof executes the original design, that constitutes the commission of the crime by the accessory before the fact. No crime is committed until the agent executes the orders of his principal, and the criminal responsibility of him who procures the act to be performed depends upon its performance by the agent. * * * The statute having treated the accessory before the fact as a principal, he may be tried before, with, or after the person who actually committed the overt act; but, his connection therewith being dependent upon the commission of the crime by his agent, the guilt of the latter must of necessity be an issue at the trial of the former, * * *." State v. Steevas, 29 Or 85, 93, 43 P 947.

While the defendant may have planned a series of crimes with but a single objective or purpose in mind, he had to have a criminal intent, coupled with the criminal intent of each agent to commit each crime, to reach his objective.

We have carefully reviewed the record and finding no error, the judgment is affirmed.

APPENDIX B

JUDGMENTS BELOW

(1) JUDGMENT OF AFFIRMANCE

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 2nd day of OCTOBER 1961, WHEREUPON on this WEDNESDAY, the 18th day of OCTOBER 1961, the same being the 10th judicial day of said terms, * * * the following proceedings were had:

STATE OF OREGON, *Respondent*

v.

LEVI SARFIELD MCDONALD, *Appellant*

Appeal from CLACKAMAS *County*

This cause on June 5, 1961, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the Court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below rendered and entered in this cause be and the same is in all things affirmed.

IT FURTHER IS ORDERED that respondent have and recover of and from appellant its costs and disbursements in this Court taxed at $15.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.

(2) JUDGMENT DENYING REHEARING

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 2nd day of OCTOBER 1961, WHEREUPON on this TUESDAY, the 14th day of NOVEMBER 1961, the same being the 20th Judicial day of said term, * * * the following proceedings were had:

STATE OF OREGON, *Respondent*

v.

LEVI SARFIELD McDONALD, *Appellant*

Appeal from CLACKAMAS *County*

The Court having duly considered appellant's petition for rehearing and being fully advised therein,

IT HEREBY IS ORDERED that such petition be and the same hereby is denied.